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THE HAMILTON STATUS OF WOMEN COMMITTEE

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ONTARIO LAW REFORM COMMISSION

REPORT ON FAMILY PROPERTY LAW

PART IV

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EQUALITY WITHOUT PATRONAGE

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We, the members of the Hamilton Status of Women Committee, have considered the recommendations of the Ontario Law Reform Commission Report on Family Law and, while we are appreciative of the efforts of the Commission and encouraged by its attempt to achieve recognition of the status and contribution of women in marriage, we beg to submit our views and criticisms of the Commission's recommendations.

1. THE MATRIMONIAL PARTNERSHIP

Initially it is the opinion of this Committee that the shortcomings of the proposed reform stem from the Commission's approach which is "...based upon the principle of marriage as an economic partnership" (Recommendation #1).

The present wording of Recommendation #1 falls short of what is, in the opinion of this Committee, the reality of the family unit as a community within a community. To label the principle of marriage as merely "an economic partnership" totally disregards the social importance of that relationship and puts undue stress on a financial justification for the existence of the unit.

It is the social relationship that warrants creation of the economic partnership and not vice versa. It is the social relationship - not the financial one - that is the

cornerstone of the community, and it is the evolution of attitudes toward the role of each member of that social unit that necessitates a report of this sort.

This Committee therefore recommends the revision of Recommendation #1 as follows:

1. A new matrimonial property system known as the "matrimonial property regime", should be created in Ontario which would give recognition to marriage as, inter alia, a socio-economic unit.

11. APPLICATION OF THE REGIME

If more than simple lip service is meant to be given to recognizing a wife's role in a marriage and indeed, in society, it is the opinion of this Committee, that the legislation implementing the matrimonial property regime have retrospective effect. Anything less serves little purpose.

If there is not uniformity of application of the new regime, the Commission's efforts to reform not only the law, but also the attitude of the community where necessary, will be wasted. Nor will any certainty or clarity be brought to what is, it is universally agreed, already a confused and clouded area of the law. Anything less than universal application, with one exception to be noted, will put the public to great torment and expense in attempts to resolve. Nor will it achieve any protection for those thousands of marriage partners whose socio-economic futures are presently jeopardized.

This Committee does recognize however, that there are those marriages for which a matrimonial property regime as proposed by the Commission would, in the consideration of the parties to those marriages, be undesirable. Also, it would be an unfair usurpation of individual (albeit joint) initiative to compel submission to the new regime. A form of option is therefore desirable.

This Committee therefore recommends the revision of Recommendations 2, and 72 to 85 inclusive as follows:

2. The matrimonial property regime should be the basic regime for Ontario, applying to all married persons, irrespective of the date of the marriage unless they formally elect to have their property relations governed by contract.
72. Spouses who do not want to be subject to the matrimonial property regime should have the power to arrange by express contract the particular terms that are to govern their relations, with respect to property, which contract shall be registered with the Registrar General of Ontario.
73. All Contracts purporting to alter the matrimonial relations between married persons should be presumed to be a variation of the matrimonial property regime unless proof is established to the contrary.
74. No marriage contract should be able to alter the rights and obligations of the spouses as recommended in this report respecting the matrimonial home, (except as provided in recommendations dealing with same), support obligations, the agency of necessity and succession which would apply to all married persons in Ontario.

75. Persons planning to marry who would otherwise be subject to the matrimonial property regime but who do not wish that regime to apply shall make a statutory declaration to that effect to which shall be appended a contract governing their property relations made in contemplation of marriage of each to the other.
76. The declaration and appended contract in recommendation #75 shall be registered with the Registrar General of Ontario.
77. Spouses who, prior to the marriage have not registered such a statutory declaration as set out in Recommendation #75 should be considered by the law of Ontario to be subject to the matrimonial property regime unless and until they take such steps as are recommended below for the changing of the regime after marriage.
78. Married persons who, after marriage wish to change from the matrimonial property regime governed by express contract shall make a joint summary application to the court for termination.
79. Every application for termination of the regime under Recommendation #78 shall be registered as an order of the Court with the Registrar General of Ontario along with the express contract arrived at between the partners.
80. Married persons who, at the time of the marriage, have filed the statutory declaration and express contract as set out in Recommendation #75 should be free to change to the matrimonial property regime at any time by means of a statutory declaration filed with the Registrar General.
- *81. (Same)
82. (Delete)

83. (Delete)

84. (Same)

85. (Same)

111. PRINCIPLES OF THE EQUALIZING CLAIM

To the marriage partnership is brought 100% of both parties and not 50-50 shares as is the commonly expressed sentiment.

It is essential however, that when the necessity - whether by death or divorce - of recognizing the contribution of partners to the relationship, the recognition of equality of the partners should be achieved without patronage to the female. Not to do so would improperly reflect what is, in the opinion of this Committee, the desires and requirements of women to-day. Patronage to the wife would of course work to the detriment of husbands, and, if this Committee's interpretation of the socio-economic reality of marriage is accepted, to the detriment of the Community at large.

While this Committee endorses the "equalizing claim" and its enforcement as a personal claim of debt, as the method of distributing property upon the dissolution of marriage, we do not subscribe in toto to the Commission's proposed method of calculation, indentification and valuation of property which will be subject to the claim.

We think it is of great importance that citizens entering marriage and leaving it, have an open awareness that it is not an escape from responsibility one to another and both to the

community. The equalizing claim ought not to discourage individual initiative and independence nor promote fortune hunting by members of either sex. Neither should the scheme, in an attempt to recognize the contribution of homemakers and mothers, patronize the female citizens of this province who are seeking a long awaited fair share for their efforts.

It is the opinion of this Committee that these are the risks attendant upon implementation of certain of the Commission's recommendations with respect to the equalizing claim as they presently stand.

This Committee therefore recommends a general revision of thought with respect to the equalizing claim. (Recommendations #3 to 31 inclusive*) so as to give real meaning to the principle of equality in the proposed scheme and consistency in the application of that principle.

We make particular reference to Recommendations #8*, 9*, 11*, 16*, 18*, and 21*. It is the opinion of the Committee that ante-nuptial property, its capital appreciation and income, if any, should be deductible from the net estate of the owner spouse.

If however, the net capital gain of ante-nuptial property is to be shareable through the equalizing claim so too should the net capital losses; so too should be net capital losses to property acquired through the benevolence of third

*See Appendix "A"

parties. We take this attitude particularly in view of Recommendation #5(e)*, which, if implemented, would permit the winding up of the regime when a "...spouse's legitimate expectations in the shareable values of assets are jeopardized".

With reference to Recommendation #11, we recommend a revision as follows:

11. There should be a sharing of those debts unpaid at the termination of the matrimonial property regime that were assumed for the purpose of discharging either the obligation to support children of the marriage or for the purpose of discharging either the obligation to support children of the marriage or for the purpose of contributing towards the mutual use, benefit, and enjoyment of both spouses.

It appears to this Committee to be grossly unjust that, using the Commission's example #5 on page 65 of the Report, persons, who, for their mutual enjoyment incur a debt should not be required to assume equal responsibility for that debt which potentially has the effect of jeopardizing legitimate expectations in the shareable values of assets.

Whatever be the resolution of the method of calculation and valuation of the equalizing claim, this Committee strongly urges that definite provision be made for the identification and valuation of ante-nuptial property. It is already recognized that under our present system, great difficulties are faced by persons trying to establish ownership to property - real or personal - when the time arises for the division of assets. This is so particularly in cases of marriages of long duration where receipts etc., are no longer in existence.

* See Appendix "A"

In order to overcome this difficulty with respect to ante-nuptial property under the new regime this Committee recommends the following:

1. all persons about to be married be required to apply for marriage licences (the publication of banns need not be abolished but it would no longer be an alternative to licences).
2. at the time of application for licence both parties, other than those who wish their property relations to be governed by express contract, be required to file with the municipal clerk a sworn declaration identifying ante-nuptial property and their fair market value (articles of personal wearing apparel and jewellery excepted).
3. additions or deletions to the declaration be permitted up to the date of the marriage.
4. after the date of the marriage the declaration should be forwarded to the Registrar General of Ontario for filing.

While this proposal will not enure to the benefit of presently existing marriages it will offer some protection for persons married after the date of legislation should there later be a need to identify and evaluate ante-nuptial property.

IV THE MATRIMONIAL HOME

This Committee is in agreement with the Commission's special treatment of the matrimonial home and the recommendation that legislation affecting it be retrospective in application.

However, we would recommend that paragraph (a) of Recommendation #99 be deleted. It is offensive to the principle of equality without patronage as adopted by this Committee

that wives should receive a benefit or advantage that is unavailable to husbands. Rather than permitting the same treatment of matrimonial homes registered solely in the name of husbands, this Committee would recommend total deletion of such preferential treatment.

It is also the view of this Committee that in the implementation of Recommendation #96 it ought to be made patently clear that married persons might jointly by express contract alter their beneficial interests in the matrimonial home. No doubt such an option will most commonly be exercised by parties to a second marriage, both of whom may have owned residential properties prior to the second marriage.

V. SUPPORT OBLIGATIONS AND AGENCY RELATIONS

This Committee is in basic agreement with the Commissions recommendations with respect to support obligations and agency relationships and endorses particularly Recommendations #54 to 58 inclusive*.

However, we are in opposition to Recommendation #59* which, in the opinion of this Committee, is offensive to the principle of equality without patronage and indeed in conflict with the Commission's own Recommendation #58.

While this Committee applauds any scheme that would "provide that the respective contributions of husbands and wives should be assessed not only in monetary terms" (Recommendation #59) we would regret the passing of any legislation

*See Appendix "A"

that would shoulder a "primary liability" upon one partner or another, particularly in view of the proposed availability of an equalizing claim.

In dealing with agency relations it is the opinion of this Committee that the right of married women, deserted or not, to pledge her husband's credit for necessities ought to be given statutory recognition only insofar as it is necessary to give practical effect to Recommendation #58. We are of the opinion that if the principle of mutual support is adequately ennuiciated in legislative form, any special handling of the agency of necessity would be redundant.

VI UNIFIED FAMILY COURT

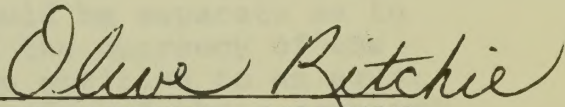
Although it is not within the purview of Part IV of the Commission's Report on Family Law, nor entirely within the jurisdiction of the Provincial Government, we wish to express our strong support for the implementation of a unified Family Court in Ontario.

We urge upon our provincially elected representatives full co-operation with the Federal Minister of Justice to ensure that what is now an unduly fragmented system of judicial administration, be revamped to establish one Family Court which would exercise comprehensive and integrated jurisdiction over all matters of a matrimonial or familial nature, including administration of the Juvenile Delinquents Act, Child Welfare Act and related legislation.

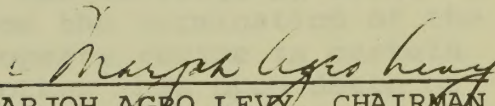
In conclusion, we the members of the Hamilton Status of Women Committee wish to express our thanks to Hamilton City Council for affording us the opportunity as one of its Advisory Committees, to make known our concerns relating to these recommendations. The Committee trusts that its observations will assist legislators in the formidable task of ensuring a "fair share" for husbands and wives and, perchance, obviate the necessity for a men's liberation movement.

All of which is respectfully submitted.

Dated at Hamilton this 24th day of October, 1974.



OLIVE RITCHIE, CHAIRMAN
Hamilton Status of Women Committee



MARJOH AGRO LEVY, CHAIRMAN
Sub-Committee on Family Property Law

Members of Sub-Committee:

Marjoh Agro Levy, Chairman
Olive Ritchie
Alderman Pat Ford
Betty Ward
Donald Moffat

S.J. Dembe, Secretary

APPENDIX "A"

The following are the contents of the recommendations of the Ontario Law Reform Commission Report on Family Property Law, Part 4, which are dealt with in this brief:-

1. A new matrimonial property system, known as "the matrimonial property regime", should be created in Ontario, based upon the principle of marriage as an economic partnership.
2. The matrimonial property regime should be the basic regime for Ontario, applying to all persons married after the effective date of the legislation by which it is created, unless they formally elect to have their property relations governed by the regime of separation of property or by the contractual regime.
3. The spouses should be separate as to property during the currency of the marriage, and be entitled to an equal sharing in the value of their combined assets acquired during marriage, in accordance with the subsequent detailed recommendations of this report, upon the termination of the marriage by death or divorce, or upon the termination of the matrimonial property regime in certain circumstances other than upon death or divorce.
4. The equal sharing should be accomplished by means of a personal claim of debt rather than by a claim to specific assets.

5. The matrimonial property regime should be automatically terminated by death, and be capable of termination by court application in any one or more of the following situations:
 - a. in proceedings for divorce under the Divorce Act;
 - b. in proceedings for a "declaration of status" which would have the effect of determining that the marriage does not now exist;
 - c. on a joint application to the court by the spouses for a winding-up of the regime;
 - d. on an application to the court, by one spouse only, for a winding-up of the regime where the spouses have been separated and living apart for at least one year, and where, in the opinion of the court, normal cohabitation between them has terminated;
 - e. on an application to the court by one spouse, for a winding-up of the regime on the ground that that spouses' legitimate expectations in the sharable values of assets are jeopardized;
 - f. on an application to the court by one spouse for a winding-up of the regime where the other spouse has sold the matrimonial home, or granted security over it, without the consent in writing of the applicant spouse to the sale or security, and there has been no court order dispensing with the consent of the applicant spouse;
6. The current net value of all property acquired during marriage by either spouse should be subject to the equalizing claim between the spouses, other than the net value of property

12. acquired by either spouse during the marriage by gift, inheritance, bequest, trust or settlement from a third party or the other spouse, together with the amount of the income earned from such property if, by the terms of the gift, trust or settlement, the income is expressly declared not to be subject to an equalizing claim.
7. The net value of all ante-nuptial property, determined at the date of the marriage, should not be brought into the calculation of the equalizing claim.
8. The value of the net capital appreciation to all property deductible pursuant to recommendations 6 and 7, above, should be shared between the spouses rather than being a deductible item in the valuation of assets held at the time of termination of the matrimonial property regime.
9. The amount of the income earned from all property deductible pursuant to recommendations 6 and 7, above, except as provided in recommendation 6, should not be a deductible item in the valuation of assets held at the time of termination of the matrimonial property regime.
10. A spouse's post-nuptial debts and liabilities, except as provided in recommendation 11, below, should be taken into the equalizing claim computation only to the extent that they result in the reduction of the residuary estate of that spouse to zero.
11. There should be a sharing of those debts unpaid at the termination of the matrimonial property regime that were assumed for the purpose of discharging either the obligation to support the children of the marriage or for the purpose of contributing towards the mutual support of both spouses.

12. In any proceeding dealing with the termination of the matrimonial property regime, it should be presumed, unless the contrary is shown, that all the property of each spouse is shareable.
13. The deductible value of a spouse's ante-nuptial property should never be an amount in excess of the value of his or her net worth at the time of marriage.
14. Where, at the time of marriage, a spouse's debts exceed the value of his or her assets, the ante-nuptial position should be fixed at zero.
15. Net capital gains accruing to property comprised in a spouse's ante-nuptial net worth should be shared through the equalizing claim.
16. Net capital losses to property comprised in a spouse's ante-nuptial net worth should be borne by the owner-spouse and not be shared.
17. Net capital gains accruing to property acquired during marriage by gift, bequest, inheritance, trust or settlement from another person should be shared through the equalizing claim.
18. Net capital losses to property acquired during marriage by gift, bequest, inheritance, trust or settlement from another person should be borne by the owner-spouse.
19. If a spouse has both ante-nuptial and property acquired during marriage by gift, bequest, inheritance, trust or settlement from another person, both classes of property should be treated as a single pool of assets for the purpose of ascertaining the amount of shareable net capital gains or the amount of net capital losses to be borne by the owner-spouse.

20. If a donor expressly so provides, the income received from a gift, bequest, inheritance, trust or settlement may be deducted from the net estate of the spouse in whose favour the disposition was made, provided that losses to or wastage of deductible gift income fall on the spouse receiving the income.
21. Appreciations in the value of assets purchased with income that is deductible under recommendation 20, above, should be shared through the equalizing claim.
22. Upon an application to the court for termination of the matrimonial property regime, each spouse should be required to produce a sworn inventory that makes full disclosure to the other spouse of all relevant values, transactions and details of ownership affecting the basis of computation for his or her residuary estate.
23. If a spouse fails or refuses to produce an inventory, the court should have the power to order that one be taken.
24. Where in any proceeding for the termination of the matrimonial property regime there has been an intentional or negligent omission of property from an inventory, or a failure to disclose, or a mis-statement of a material fact by one spouse, resulting in a financial loss to the other, the court should have the power to order that the wrongdoer pay the full amount of the loss to the other spouse.
25. Where an omission, failure to disclose or mis-statement of the sort mentioned in recommendation 24, above, is not discovered before the conclusion of the termination proceedings, the spouse suffering the financial loss should have a remedy for the amount of the loss by an action for debt.

26. A spouse who is unwilling or unable to do so should not be required to establish allowable deductions on his or her inventory.
27. Settlement of the equalizing claim should be in money, or in property which the creditor-spouse agrees to accept in lieu of money.
28. Enforcement of the equalizing claim should be by an action for debt.
29. The debtor-spouse should be given an option to pay the equalizing claim by instalments with interest at the current rate, over a term not exceeding ten years, provided that an adequate security interest is granted in favour of the creditor-spouse.
30. The court is given power:
 - a. to determine any dispute arising out of the claim, including the adequacy of the proposed security;
 - b. to vary the payment term chosen by the debtor-spouse, on the ground of hardship to a spouse or infant children, or embarrassment to a business; and
 - c. on application of either spouse, at any time before the full amount due has been paid, to vary its prior order as to the security for the payment of the claim.
31. All third party creditors should rank ahead of the creditor-spouse.
54. A parent should have a legal obligation, arising automatically on proof of paternity or maternity, to support his or her child whether the parenthood arose by nature or adoption.
55. The standard of support afforded a child by its parents should be sufficient to enable him or her to maintain a reasonable standard of living, having regard to the

circumstances of the parents if they are married, and having regard, otherwise, to what the child might have enjoyed were its parents married and cohabiting.

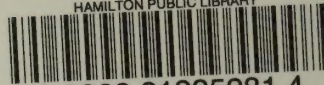
56. In every case support should depend on the ability of the parents to provide it, and where two parents are liable, their obligations should be based on their respective resources and ability to pay.
57. To the extent that they are financially capable of doing so, the primary support obligation, up to the limits that may from time to time be established under The Parents' Maintenance Act, should remain with the child of the elderly person.
58. Spouses should have the legal obligation to contribute, according to their means and ability, to their mutual support.
59. The legislation creating the mutual support obligation should provide that the respective contributions of husbands and wives should be assessed not only in monetary terms and that the matter of financial provision, the primary liability rests upon the husband.
72. Spouses who do not want to be subject to the matrimonial property regime should have the power to agree to one of the following alternatives:
 - a. to choose the separate property regime; or
 - b. to choose the foreign property regime provided by the law of the habitual residence of either the husband or the wife at the time of marriage, if permitted to do so according to the choice of law recommendations made in this report; or

- c. to arrange by express contract the particular terms that are to govern their relations with respect to property.
- 73. All contracts purporting to alter the matrimonial property relations between married persons should be presumed to be variations of the matrimonial property regime, until some other regime is proved to be applicable.
- 74. No marriage contract or choice should be able to alter the rights and obligations of the spouses as recommended in this report respecting the matrimonial home, support obligations, the agency of necessity and succession, which should apply to all married persons in Ontario.
- 75. Persons planning to marry who would otherwise be subject to the matrimonial property regime, but who do not wish that regime to apply, should be able to make a statutory declaration to that effect, specifying that the parties agree to be separate as to property or, if permitted to do so by the choice of law rules set out in chapter 10, agree to the application of some foreign law.
- 76. There should be a requirement that a statutory declaration made in accordance with recommendation 75 be registered with the Registrar General of Ontario.
- 77. Spouses, who, prior to the marriage, have not registered such a statutory declaration, should be considered by the law of Ontario to be subject to the matrimonial property regime unless and until they take such steps as are recommended below for changing their regime after marriage.
- 78. Married persons, who, after marriage, wish to change from the matrimonial property regime to the separate property regime, or to any other regime permitted under the choice of law rules recommended in chapter 10 of this report, should be required to make a joint application to the court for termination.

79. Every application under recommendation 78 that is granted should be required to be registered as an order of the court with the Registrar General of Ontario.
80. Married persons who,
 - a. have, by statutory declaration, chosen separation of property the time of marriage, or
 - b. were already married and separate as to property at the time when the legislation creating the matrimonial property regime came into effect,should be free to change to the matrimonial property regime at any time by means of a statutory declaration filed with the Registrar General of Ontario.
81. The same rule contained in recommendation 80 should apply to married persons whose property relations are governed by a foreign law, subject to any additional requirements which that law may prescribe.
82. Where the matrimonial property regime is terminated by court order, and the marriage continues to exist, the spouses should automatically be subject to separation of property.
83. The court order referred to in recommendation 82 should be required to be registered with the Registrar General of Ontario.
84. A simple form of statutory declaration, appropriate for the above mentioned purposes, should be devised and included in the legislation implementing these proposals.
85. No choice of regimes should be recognized by the law of Ontario unless it has been made in accordance with the formal requirements recommended above.
96. Subject to the recommendation in paragraphs 97 and 98, as between themselves, spouses should be free to vary their beneficial interests in the matrimonial home by agreement, express or implied.

99. In giving the legislation which implements these proposals retrospective effect, it should be provided:
- a. that the principle of co-ownership should not apply to matrimonial homes that were, on the effective date of the legislation, registered solely in the name of a wife, unless there is evidence sufficient to satisfy a court that the spouses have agreed to share the beneficial interest therein, and
 - b. that existing security interests of third parties (including execution creditors) in a matrimonial home, as of the effective date of such legislation, are expressly preserved and, except for those provisions governing the procedure to be followed in the realization of a security interest in a matrimonial home, are unaffected by it, and
 - c. in all other respects, the legislation is to have retrospective effect only as between spouses.

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